United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

1251

76-2046

To be argued by
HERBERT S. KASSNER

United States Court of Appeals
FOR THE SECOND CIRCUIT

JERRY GOMBERG,

Petitioner-Appellant,

v.

LOUIS GRECO, Warden of the New York City Men's House of Detention of Rikers Island, or any other person having custody of Jerry Gomberg,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Jerry Gomberg appeals from an Order entered in the United States District Court for the Southern District of New York (Wyatt, J.) on April 1, 1976, dismissing his petition for a writ of habeas corpus.

The petition was originally filed in the United States District Court for the Eastern District of New York and on that Court's motion was transferred to the United States District Court for the Southern District of New York on February 13, 1976.

The respondent Louis Greco, appearing by the District Attorney of New York County, filed an affidavit in the nature of an answer to the petition.

Thereafter, the district court by a written memorandum and order dismissed the petition on April 1, 1976. Petitioner then moved for the issuance of a certificate of probable cause and this motion was granted by the district court on April 16, 1976. A timely notice of appeal was then filed.

STATEMENT OF FACTS

On July 11, 1973, the New York County Grand Jury indicted Martin Hodas, petitioner Jerry Gomberg, and George Kaplan, on two counts of arson in the second degree and two counts of criminal mischief in the fourth degree.

All three defendants went to trial before Hon. Richard G. Denzer and a jury. On December 20, 1973, the jury acquitted Hodas, but convicted both Gomberg and Kaplan of two counts of arson in the second degree.

After extensive post-trial hearings, brought about by a Gomberg-Kaplan motion for a new trial, Judge Denzer declined to grant the two any relief, and on April 19, 1974, he sentenced both Gomberg and Kaplan to indeterminate terms not to exceed seven years. The conviction was affirmed by the Appellate Division of the Supreme Court, First Department, and the New York Court of Appeals, 38 N.Y. 2d 307 (1975).

The evidence presented by the prosecution at the trial through the mouths of three self-confessed arsonists (Morton, Jones and Haton) was that they had been employed by all three defendants, including Gomberg, to burn down two rival massage parlors. This was allegedly corroborated by the owner of one of the incinerated parlors (Valentine) who had been released from a British prison for the purpose of giving his testimony that the three defendants had impliedly threatened him with arson unless he raised his prices. This was substantially all of the People's case.

Since proving a negative, that defendants did not employ the arsonists to incinerate the two nearby premises, is difficult at best, the defense was founded entirely upon an illustration of the interest of the aforesaid prosecution witnesses and an attack upon their credibility. The tone and theory of the defense was clearly set forth at the very outset of the trial in the initial remarks of defendants' opening statement.

The trial produced no surprises. Each of the arsonists' testimony contradicted each of the others in various material respects. The testimony of each was self-contradictory. Each told a story which varied significantly with at least one or more prior statements he had made. The criminal records of each manifested a propensity towards the commission of violent crime, with one (Hatton) being a convicted perjurer and one (Valentine, the corroborator) having an arson background. In fact, two of the arsonists (Morton and Hatton) directly contradicted the corroborator on a number of occasions.

The interest of each of the four, though quite apparent, could not be pinned down to prosecution promises of leniency as to Morton and Hatton, the key arsonists, who steadfastly denied such promises.

Thus, at the end of the trial, as at the beginning, it was defendants' position that these prosecution witnesses could not possibly be believed. Pecularly, the jury believed them as to Gomberg and Kaplan, but did not as to H[illegible]as,

notwithstanding the fact that the prosecution testimony as to all three was virtually identical.

Soon after the trial, Hatton, who was then a fugitive from justice and an escapee from custody, was paid by the prosecutor and given a one-way plane ticket to Los Angeles, and Morton and Jones were allowed to plead to their indictment, conditionally discharged, and paid and given a one-way plane ticket out of the State.

In any event, it is not surprising that these arsonists would, after the trial, tell yet another set of contradictory stories about the fires, this time exculpating the defendants and charging prosecution officials and their aides with gross misconduct including but not limited to intimidation, subornation of perjury, failure to disclose promises of immunity and leniency, and aiding and abetting a fugitive from justice to escape the jurisdiction.

The trial judge found these recantation statements of the arsonists unworthy of belief. While it cannot be doubted that their prior series of contradictory statements and trial testimony was equally unworthy of belief, defendants were nevertheless convicted on the basis of just such testimony.

(1)

KAVANAUGH INDUCED AND PERMITTED HATTON TO PERJURE HIMSELF BY TESTIFYING THAT HE HAD ONLY SEEN KAVANAUGH TWICE AND ONLY SPOKEN TO HIM ONCE BEFORE THE TRIAL

On direct examination, Assistant District Attorney

Kavanaugh asked Hatton the following question and received the following answer:

> "Q. Now, when was the first time that you can recall speaking to me about this case?
>
> A. About this particular case? Well, yesterday afternoon." (A39)

He then ended his direct and the court adjourned to the next day when Kavanaugh sought and was granted leave to reopen Hatton's direct for the purpose of correcting Hatton's testimony by disclosing a meeting with Hatton which was the subject of a tape recording that had been turned over to the defense.

The following testimony resulted:

> "Q. Yesterday, towards the end of the day, I had asked you when was the first time you and I had discussed or talked about this case, and you indicated a few days before. Do you recall going to the District Attorney's office in April of this year and discussing this case?
>
> A. Yes, I believe it was the Assistant District Attorney Jacobs.
>
> Q. Do you recall seeing me in that room?
>
> A. I met you there. I recall meeting you there.
>
> Q. So the first time that we met was not several days ago, but in April of '73, is that correct?
>
> A. Yes, Sir" (A41, 42)

Thus at the end of Hatton's direct, the impression left with the jury was that Hatton had seen Kavanaugh once in April, 1973 and had spoken to him once immediately prior to trial. The purpose of asking these questions and

receiving these answers was obviously to negate the clear intent of defense counsel to prove or infer that the witnesses had been prepared for over a year to give false non-conflicting stories.

On cross examination, Hatton stuck to his story.

> "Q. Did you speak to the District Attorney about the fires?
>
> A. After the second conversation.
>
> Q. After April 26, 1973?
>
> A. Yes.
>
> Q. When was that?
>
> A. A few days ago.
>
> Q. A few days ago. And did you again tell him the story of the fire?
>
> A. Yes I did".(A47)

The Court, seeking to pin down the testimony on this subject interjected during cross:

> "The Court: Please, now the question is, never mind the language, whether its a story or your version or anything else. Did you ever describe the fires to anybody else, other than the people that have just been mentioned: In other words, the District Attorney twice, the Fire Marshal once, Mr. Detsky, and the defendants, as you say, to anybody else?
>
> "The Witness: No, Sir." (A48)

Hatton continued to insist that he had only spoken to the District Attorney in April, 1973 and once immediately prior to trial.

Kavanaugh said nothing while Hatton lied in response to his own questions, defense counsel's questions and the

Court's questions.

During his testimony in the recantation hearing Kavanaugh admitted that Hatton was in his office on more than one occasion prior to trial. In fact the arsonists had visited him so often prior to trial that he couldn't recall the details.

> "I just don't remember. I had these people (Jones, Morton and Hatton) over so many times, I frankly don't recall. I know that they were present together, MR. Morton, Mr. Jones and Mr. Hatton on more than one occasion in the area of my office (while preparing for trial). No question about that" (A224)
>
> . . . . . .
>
> "Q. And you had spoken to Mr. Hatton also several times before testifying?
>
> A. Yes sir." (A 208)

It should be recalled that Kavanaugh introduced this issue in direct examination. He thought it sufficiently important to anticipate cross examination in that regard.

In any event, it is clear that Kavanaugh elicited answers which he knew to be false and perjurious from his own witness, Hatton, allowed those answers to be reiterated in response to defense counsel and Court interrogation, and did nothing to correct the lie.

(2)

KAVANAUGH PERMITTED HATTON TO PERJURE HIMSELF BY TESTIFYING THAT HE HAD NEVER SPOKEN TO MORTON FROM THE TIME NEARLY 16 MONTHS BEFORE WHEN MORTON WAS ARRESTED UP TO THE DATE OF THE TRIAL

On cross-examination of Hatton, for the purpose of establishing the conscious correlation of stories of the arsonist, defense counsel asked the following question and received the following answer:

> "Q. When was the last time, before yesterday, that you spoke to Morton?
>
> A. The last time before yesterday? That's when he got arrested. Before he was arrested, about a week before that." (A56)

Since it was established that Morton had been arrested well over a year prior to the trial and had been in custody ever since, the answer served to dispel any inference of coordinated prosecution testimony.

Kavanaugh knew the answer to be false, yet did nothing to reveal the lie. During his recantation testimony he admitted that Hatton and Morton had been together at his office on a number of occasions prior to trial.

> "I just don't remember. I had these people (Jones, Morton & Hatton) over so many times, I frankly don't recall. I know that they were present together, Mr. Morton, Mr. Jones and Mr. Hatton on more than one occasion in the area of my office (while preparing for trial). No question about that." (A224)
>
> "They weren't in my office. They were in an ante room outside my office." (A224)

(3)

KAVANAUGH PERMITTED MORTON TO PERJURE HIMSELF BY TESTIFYING THAT HE HAD NOT SPOKEN TO KAVANAUGH FROM APRIL, 1973 THROUGH THE DATE OF TRIAL EXCEPT ON ONE OCCASION SHORTLY BEFORE THE TRIAL, THE SOLE PURPOSE OF WHICH WAS TO ADVISE HIM THAT HE "WOULD BE GOING ON TRIAL SOON".

On cross, Morton testified that he had only spoken to the District Attorney once after April, 1973, and that conversation, shortly before trial, was for the sole purpose of advising him that he would be going to trial soon.

"Q. When is the last time you were questioned by the District Attorney?

A. Last week. (A114)

Q. What did you do there last week with the District Attorney?

A. He was telling me I would be going on trial soon. (A115)

. . . . .

Q. That's all, is that correct?

A. Yes.

Q. How long did the interview take?

A. About thirty minutes...(A116

Q. O.K. Now the time before this thirty minute interview, when was that?

. . . . .

A. I can't recall (A 116)

Q. Did this take place April, 1973?

A. Yes" (A117)

Assistant District Attorney Kavanaugh sat by without comment as he listened to the foregoing lies of his client. In his recantation hearing testimony, he admitted that he had spoken to Morton so many times before the trial that he could not recall the number.

He further testified:

"I have had several conversations with Mr. Morton after the tape recording and I had several conversations with him prior to his testifying at trial."(A)

Kavanaugh also admitted that he had thoroughly prepared Morton's testimony.

> "A. I went over Mr. Morton's inconsistencies. I told him that I wanted him to testify from his present recollection of the events of May and July of 1972. I asked him if his prior testimony refreshed his recollection concerning some of the inconsistencies, if they did, I said fine. If they didn't, I wanted him to stick to his recollection. I told him that he would be asked about these inconsistencies on cross-examination. I also told him that he was most certainly going to be asked about whether he expected to have anything to gain, gain anything by testifying."(A218)

It is thus apparent that Kavanaugh was unwilling to dispel at trial the impression given by Morton that his testimony had neither been accomodated to that of his fellow arsonists or even prepared in conjunction with the District Attorney's cooperation. Since such preparation and correlation was at the heart of defendants' defense, this malfeasance by Assistant District Attorney Kavanaugh in permitting the perjured testimony must have necessarily had a crucial impact on the deceived jury.

On recantation, Kavanaugh admitted preparing the testimony of all three witnesses in an attempt to eliminate the inconsistencies and conflicts among their various stories.

> "Q. Now, was there a time when you sought to get the testimony of the witnesses together with regard to the amount of money that was paid?
>
> A. I don't know what you mean by get together.

Q. Well there were various conflicts over the amounts of money.

A. Do you mean by discussing it with the three of them together in the same room?

Q. No, discussing, let's take each individual first.

A. Most definitely."(A219,220)

Thus, by failing to correct Morton's perjury, Kavanaugh permitted the jury to believe that no conflicts and inconsistencies could have possibly been eliminated through pre-trial preparation of Morton, which, of course, was false. Defendants' basic defense of correlated perjury was thus undercut by the lie which Kavanaugh permitted to be uttered by his witness without correction.

(4)

KAVANAUGH PERMITTED HATTON TO PERJURE HIMSELF BY TESTIFYING THAT NO PUBLIC OFFICIAL HAD EVER ADVISED HIM THAT HIS COOPERATION WOULD INURE TO HIS BENEFIT IN ANY WAY. HE THEN FAILED TO REVEAL TO THE JURY PROMISES HE MADE TO HATTON DURING THE TRIAL

On cross examination, Hatton lied as follows:

"Q. Did any public official say that your cooperation would inure to your benefit in any way?

A. No, sir, they did not. (A57-58)

Q. Did any District Attorney, at any time, tell you that your cooperation would be brought to the attention of the appropriate authorities?

A. No, sir, they didn't." (A60)

The District Attorney did nothing to correct the

clear lie which he knew to be a lie.

Later in cross examination Hatton was confronted with a quotation from a taped conversation to which he was a party. He then recanted his prior perjury.

> "Q. Did the District Attorney also promise you on that occasion (April, 1973): 'Any cooperation that you give us here will be brought to the proper authorities. I know that you are incarcerated now.'
>
> A. I believe that was said, yes, sir." (A 74)

Notwithstanding the foregoing, Assistant District Attorney Kavanaugh on redirect, attempted to revive the lie by distinguishing between his personal promise and that of some other public official.

> "Q. Were you ever promised anything by me concerning your cooperation in testifying before the three defendants in this case?
>
> A. No." (A81)

The foregoing could have no purpose other than to confuse the jury with respect to the issue of interest of this witness and reinstate the original false impression that no promises or at least no binding promises had been made to the witness by the prosecution.

Lest it be thought that Kavanaugh did not know of promises to Hatton, he admitted such knowledge in his recantation proceeding testimony.

> "Q. Did he (Fire Marshal Russo) say he made any promises to Mr. Hatton?

A. He indicated to Mr. Hatton, I think the sum and substance of it was any cooperation he would give would be brought to the attention of the District Attorney and the Court.

Q. What did Mr. Russo tell you that he told Hatton?

A. I believe that Marshal Russo told me that prior to speaking to each of the three, he had indicated to each of them...if they did talk with the marshals, that it would certainly be taken into consideration." (215)

Kavanaugh's recantation proceeding testimony further admits that in the middle of the trial he became aware that Hatton was a parole violator.

"All I said to him, not to worry about it and that was all that was said. And as far as I know, that warrant is still outstanding for his arrest. We never had taken any action toward it at all." (A 203)

Thus, even during the trial when Kavanaugh made a promise to Hatton he did not reveal it to the jury.

Kavanaugh admits that during or after Hatton's testimony, in the courthouse hall, he agreed to fly Hatton to Alaska and to give him $200.00, but then gave him only $100.00 and a plane ticket to Los Angeles. (A202, 203) Again, Kavanaugh failed in his duty to reveal this to the jury.

(5)

KAVANAUGH INDUCED AND PERMITTED MORTON TO PERJURE HIMSELF BY TESTIFYING THAT HE WAS UNSURE THAT HIS TESTIMONY COULD HELP HIM GET OUT OF JAIL

During cross examination Morton perjured himself by saying that he was unaware that his testimony would help him get out of jail faster.

Morton Cross

"Q. Do you feel giving testimony here today will help you get out of jail?

A. Not as I know of, but I hope something will happen, I'm helping myself.

Q. Has -- to your knowledge, have you or your lawyer discussed taking a plea?

A. No.

Q. Has anybody indicated to you on the part of the governmental authorities that the cooperation you give in this trial can determine how long you stay in jail?

A. No." (A 100)

On redirect these lies were reemphasized at the behest of Kavanaugh.

"Q. But, no one, either myself nor Mr. Jacobs has ever promised you anything; is that correct?

A. That's right." (A 121)

Kavanaugh, in his recantation proceeding testimony, admits instructing Morton to tell the jury that he did expect his testimony to cut his jail time.

"I asked him (Morton) what would you say and he said I don't expect to gain anything. I said, you got to be kidding. He said, what do you want me to say? I expect to get some time off of this, and I said tell the jury that." (A218)

It is, therefore, clear that there was an understanding between Morton and Kavanaugh that Morton's testimony

would reduce his imprisonment, that Morton knew he was lying when he denied it and that Kavanaugh, who had instructed him not to deny it, knew he was lying. Notwithstanding the admitted perjury, Kavanaugh failed to correct it at trial, thus joining with his witness in deceiving the jury on the basic issue of interest.

(6)

KAVANAUGH CONSPIRED WITH MORTON'S ATTORNEY TO INDUCE AND PERMIT MORTON TO COOPERATE YET TESTIFY THAT HE KNEW OF NO DECISIONS INVOLVING PLEA BARGAINS ON HIS PENDING INDICTMENT WHEN, IN FACT, KAVANAUGH HAD FINALIZED SUCH DISCUSSIONS WITH MORTON'S ATTORNEY AND HAD EVEN ATTEMPTED TO HIDE SUCH DISCUSSIONS FROM MORTON

On cross, Morton denied knowledge of any plea bargain discussions conducted with either himself or his attorney.

> "Q. Has -- to your knowledge, have you or your lawyer discussed taking a plea?
>
> A. No." (A100)

Kavanaugh stood mute and said nothing. He then compounded the deception by interrogating Morton on the issue of promises, expecting and receiving Morton's denial that anything had been promised him for his testimony.

> "Q. But, no one, either myself nor Mr. Jacobs has ever promised you anything; is that correct?
>
> A. That's right.
>
> Q. Have you, at any time, by either myself or Mr. Jacobs been promised anything for testifying in this case?
>
> A. No." (A121)

Kavanaugh did this with the knowledge that he had already completed a plea bargain with Morton, through his attorney, putting a seven-year maximum on Morton's arson indictments. (A209-210).

Thus, in his recantation proceeding testimony Kavanaugh admitted that he had evolved a scheme to conspire with Morton's attorney and thereby secure Morton's testimony yet hide the indictment therefor from the jury.

> "I had several discussions with Mr. Morton. (A195)
>
> I do specifically remember telling Mr. Krieger...that I would certainly be willing to make an appropriate arrangement with Mr. Krieger that he was not to communicate that to his client and that all I had asked him to do is communicate with his client that it was in his opinion his client's best interests to testify for us. (A197)
>
> I indicated to Mr. Krieger that if Mr. Morton would cooperate that I would, I thought it be appropriate to put a top of seven years, five or seven years on any plea that Mr. Morton would take involving the arsons. (A198)
>
> But again, I told Mr. Krieger I did not want that offer communicated to Mr. Morton with reason, I didn't want Mr. Morton, if he took the stand on the trial with reason if he took the stand he would testify to a promise of five years." (A198)

This little piece of prosecutorial chicanery enabled Mr. Kavanaugh to induce the testimony of Morton, yet hide the inducement from the jury. To say that this scheme constituted the zenith of fraud and prosecutorial misconduct would constitute an understatement.

KAVANAUGH FAILED TO DISCLOSE TO THE JURY THAT HE HAD PURCHASED THE TESTIMONY OF HATTON AND MORTON BY LIGHTLY VEILED PROMISES OF LENIENCY TOWARDS THOSE WITNESSES FOLLOWING ASSURANCES TO THE WITNESSES BY FIRE MARSHALS THAT THEIR COOPERATION WOULD BE TAKEN INTO CONSIDERATION

Kavanaugh acknowledged that he knew of pre-trial promises to his key witnesses.

> "Q. What did Mr. Russo tell you that he told Hatton?
>
> A. I believe that Marshal Russo told me that prior to speaking to each of the three, he had indicated to each of them...if they did talk with the marshals, that it would certainly be taken into consideration." (A215)

He then admitted that he had advised both Hatton and Morton that they could buy leniency at the price of implicating the defendants.

About a day or two before the trial, Hatton admitted making the fire bomb used in the arson. He was not arrested then or later.

> "I must in all candor indicate that I was primarily interested in presenting him in the most favorable light to the jury and I did not arrest him because I felt that at that point it would place before the jury another interest or reason for this man to lie. All I told Mr. Hatton was the same thing that I have told Mr. Morton, frankly, I wasn't interested in Mr. Hatton, I was interested in Mr. Kaplan, Mr. Gomberg and Mr. Hodas." (A201,202)

He then had the temerity to remind the jury, in summation, of Hatton's perjured testimony, thereby himself

reiterating and adopting the lie.

> "He (Hatton) told you that I had promised him nothing." (A186)

Kavanaugh told this to the jury despite the fact that he admitted in his recantation proceeding testimony that prior to such summation (during or after Hatton's testimony) in the courthouse, he had promised Hatton to fly him to any U.S. city and give him $200.00 (A 202

(8)

KAVANAUGH PERMITTED EXCLUDED WITNESSES TO MEET WITH AND SPEAK TO OTHER WITNESSES BOTH BEFORE AND AFTER EACH HAD TESTIFIED

Immediately prior to trial, all four basic prosecution witnesses were brought together into one room in the courthouse (A221) where they remained until excused by the Assistant District Attorney after giving testimony (A222). Kavanaugh admitted visiting them in that room (A223).

What purpose is there to exclude witnesses from the courtroom if not to insulate them from other witnesses and thereby deter collusive coordination and reconciliation of differing testimonies. This purpose was wholly negated by Assistant District Attorney Kavanaugh's amintenance of his key witnesses in one room in which they were free to discuss their testimony both before and after testifying. As will be established hereinafter, this is precisely what transpired.

NOTWITHSTANDING THE EXCLUSION OF WITNESSES, AND THE FORMAL REQUEST OF DEFENSE COUNSEL NEAR THE END OF HATTON'S TESTIMONY THAT HATTON BE KEPT AWAY FROM PROSPECTIVE PROSECUTION WITNESSES AND ASSISTANT DISTRICT ATTORNEY KAVANAUGH NOT DIVULGE HATTON'S TESTIMONY TO PROSPECTIVE WITNESSES, DURING THE LUNCHEON RECESS IMMEDIATELY FOLLOWING HATTON'S TESTIMONY AND IMMEDIATELY PRECEDING MORTON'S TESTIMONY, KAVANAUGH DID CONFER WITH HATTON AND MORTON TOGETHER IN A ROOM IN THE COURTHOUSE AND DEFENDANTS' MOTION FOR MISTRIAL WAS DENIED

Fearing collusive concatenation of testimony among prosecution witnesses, defense counsel made a formal unusual but prophetic request near the end of Hatton's testimony.

> "Mr. Kassner: I would suggest Mr. Kavanaugh not divulge testimony heard in this room to prospective witnesses in this case. That Chris Hatton (be) kept away from prospective witnesses in this case..." (A 72, 73

Hatton's testimony ended soon thereafter and trial was adjourned for lunch. Upon returning from lunch, defense counsel witnessed the fulfillment of his prophesy and reported to the Court·

> "Mr. Kassner: During recess I passed a room on this floor in which there were four people that I could see through the door, D.A. Kavanaugh, Dexter Morton, Chris Hatton and another gentleman. I didn't really catch who that was. As I walked past the door, I heard the D.A. Kavanaugh discussing the testimony of Christopher Hatton so far as he had the words 'he lied to the fire marshals.' As I had lunch

> I feared that the testimony of the defendants would be brought into some sort of collusion through such tactics and I respectfully request a mistrial in the grounds that the exclusion of witnesses have been completely violated by this conversation which I can assume has happened on more than one occasion."(A 85-86)

Kavanaugh then admitted the meeting and admitted discussing Hatton's testimony generally but denied wrongdoing. (A 86-87-89)

Mr. Kassner said that the best way to insure that the witnesses not speak to each other is to keep them segregated. (A 87)

The Judge then said they should be sehregated "if possible". (A88)

Mr. Kavanaugh justified his failure to segregate by saying Mr. Hatton "is somewhat concerned for his safety." (A88) The Court then said:

> "I don't think we should discuss it anymore. I am a little disturbed by the subject, but the motion for a mistrial is denied." (A88)

The foregoing intentional violation by the District Attorney of the letter and spirit of witness exclusion further illustrated his intention to deprive defendants of a fair trial by manipulating witness' testimony in an attempt to make the stories correspond. The fact that he was not totally successful does not belie the obvious and, at times admitted attempt.

(10)

KAVANAUGH FAILED TO ARREST AND INDICT HATTON, A CONFESSED ARSONIST, IN ORDER TO CONCEAL FROM THE JURY THE INTEREST OF HATTON IN TESTIFYING

About a day or two before the trial, Hatton admitted making the fire bomb used in the arson. He was not arrested then or later. Kavanaugh in his recantation proceeding testimony, excused this as follows:

> "I must in all candor indicate that I was primarily interested in presenting him in the most favorable light to the jury and I did not arrest him because I felt that at that point it would place before the jury another interest or reason for this man to lie. All I told Mr. Hatton was the same thing that I have told Mr. Morton, frankly, I wasn't interested in Mr. Hatton, I was interested in Mr. Kaplan, Mr. Gomberg and Mr. Hodas." (A 201-202)

Since each arson was a Class B felony calling for up to 25 years imprisonment it would appear that the interests of justice which Assistant District Attorney Kavanaugh was sworn to uphold required Hatton's prosecution for such crimes. His prosecutorial zeal, however, dictated that any tactical advantage which could be secured in the cause of convicting these defendants must be grasped, even at the cost of letting admitted felons go free for the purpose of hiding their interest in testifying from the jury.

(11)

KAVANAUGH PERJURED HIMSELF WHEN HE TESTIFIED IN THE RECANTATION PROCEEDING THAT HE WASN'T AWARE UNTIL THE MIDDLE OF THE TRIAL THAT HATTON WAS A WANTED ESCAPEE WITH A WARRANT OUT FOR HIS ARREST

During the defense opening statement, it was clearly

indicated that Hatton was an escapee from custody.

> "...Chris Hatton one day serving a sentence walked out of jail before the end of his sentence. How he walked out of jail I don't know...Now it's a peculiar incident because most of the prisoners in jails don't take sabbaticals for periods of months."(A 4)

Notwithstanding the foregoing, Kavanaugh in his recantation proceeding testimony denies knowing this until the middle of the trial.

> "All I said to him, not to worry about it and that was all that was said. And as far as I know, that warrant is still outstanding for his arrest. We never had taken any action toward it at all."(A 203)

It cannot be doubted that Kavanaugh, having run a yellow sheet check on Hatton for trial purposes, was fully aware that his witness was a wanted man whom he had decided to permit to roam free as partial payment for his testimony.

If, as is apparent, Kavanaugh lied about this, how can his protestations of failing to make promises to the witnesses for their testimony be taken seriously.

(12)

KAVANAUGH VIOLATED NEW YORK STATE PENAL LAW SECTIONS 205.05, 20.00 AND/OR 115.00 AND 115.05 BY CRIMINALLY FACILITATING AND/OR AIDING AND ABETTING THE ESCAPE OF HATTON BY GIVING HIM FUNDS AND A ONE WAY PLANE TICKET OUT OF THE STATE OF NEW YORK WITH FULL KNOWLEDGE THAT A WARRANT FOR HIS ARREST BY REASON OF HIS ESCAPE FROM CUSTODY WAS OUTSTANDING, ALL OF WHICH WAS DONE FOR THE PURPOSE OF SECURING HATTON'S TESTIMONY AT THE TRIAL

As was noted heretofore, Hatton's status as a fugitive from justice was disclosed in defense's opening

statement.

> "...Chris Hatton one day serving a sentence walked out of jail before the end of his sentence. How he walked out of jail I don't know..Now it's a peculiar incident because most of the prisoners in jails don't take sabbaticals for periods of months."(A4)

Hatton thereupon admitted his status as a fugitive who had escaped from custody. He stated that he had been placed in Granada House on a work release program. He was required to stay there until completion of his sentence. He left the facility prior to such time yet was not returned or charged with the crime of leaving such facility as of the date of the trial. (A59-60)

> "Q. By the way, are you back in jail now?
>
> A. No sir.
>
> Q. Is all your time served?
>
> A. No sir.
>
> .....
>
> Q. How much of your sentence is still unexpired from the date since you walked out of the Granada House?
>
> A. About three months.."(A69-70)

This was emphasized in the defense's summation.

> "..There is a man walking the streets of the City of New York right now named Chris Hatton who admits that he should belong injail right now on an unexpired jail term which he walked out of..He is an escaped prisoner and he is walking the streets of the City of New York. Now, why is there an escaped prisoner walking into this Court getting on the stand and walking around New York? Does the law mean nothing? A man has been sentenced, he's been convicted; he was put in jail and he's walking around in the street. (A160)

> Now, you just found out why he (Hatton) is walking the streets of the City of New York despite the fact that he didn't finish his jail term." (A161)

Even if Kavanaugh had not listened to the defense's opening statement he admitted that in the middle of the trial he became aware that Hatton was a parole violator. Not withstanding that, Kavanaugh testified at the recantation proceeding, long after the trial:

> "All I said to him, not to worry about it and that was all that was said. And as far as I know, that warrant is still outstanding for his arrest. We never had taken any action toward it at all." (A 203)

This is not true. Kavanaugh did take affirmative action with respect to this fugitive witness.

During or after his testimony, in the courthouse hall, he agreed to fly Hatton to any U.S. city. He agreed to fly him to Alaska and to get him $200.00 or a sum of money. Immediately after the trial Kavanaugh gave Hatton $100.00 and a plane ticket to Los Angeles. (A 202,203)

This is an action which he took in fulfillment of his commtiment used to purchase Hatton's perjured testimony. This is the lengths to which Assistant District Attorney Kavanaugh was willing to go to convict the defendants. He committed a series of crimes by aiding and abetting a fugitive to escape from the jurisdiction. This is quite a price to pay for a witness. Kavanaugh took it upon himself to pardon an escaped fugitive, an act which even the sentencing judge had no power to perform.

(13)

KAVANAUGH LIED BY SAYING THAT HE NEVER HAD THOSE FOUR WITNESSES TOGETHER

During the recantation hearing, Kavanaugh was asked the following question and gave the following answer:

> "Q. So your testimony that you never had them (Hatton, Morton and Jones) anytime ever together was not true?
>
> A. That's correct."(A223)

Thus Kavanaugh admits lying to cover up the inference of collusive testimony raised by the defense and denied by his witnesses' perjury.

Can anything Kavanaugh said about not promising rewards to his witnesses be believed in view of his willingness to lie under oath and his behavior with respect to his witnesses after the trial.

(14)

KAVANAUGH PRESENTED PERJURED TESTIMONY FROM VALENTINE THAT HE KNEW TO BE FALSE

On recantation, Kavanaugh admitted that he knew Valentine lied at the trial.

> "Q. Do you recall telling Mr. Valentine the reason you are not going to get a ticket is because you lied?
>
> A. Well, yes, that's true. I did tell Mr. Valentine that because Mr. Valentine--"

What excuse can a prosecutor have for allowing perjury by his own witness to go uncorrected?

In view of Valentine's adherence to his story implicating the defendants, it would be difficult to argue that

the lie in some way impaired the People's case. Even if by some stretch of the imagination the People's case was somehow impaired by the Valentine lie, Kavanaugh's failure to give Valentine the ticket would further illustrate an implied or express promise to reward Valentine only if his testimony pleased the prosecutor, a promise not revealed to the Court at trial.

It would be more logical to assume that the perjury of Valentine had to have been damaging to the defense or insubstantial. If we assume that it was insubstantial, there would have been no reason for Kavanaugh to deprive him of his promised airplane ticket. It should, therefore, be concluded that Kavanaugh punished Valentine for his lie but failed to correct it since it suited his prosecutorial motives.

It is not really significant that the lie may have helped or hurt the defense. The disclosure of the lie would have, at the least, impeached Valentine's credibility, a basic issue in the case in view of the fact that the defense testimony directly controverted Valentine's story which constituted the sole corroboration offered by the People. It was essential that Kavanaugh immediately correct the perjury of his witness. This he failed to do.

(15)

KAVANAUGH ADMITTED HIS INTENTION TO UTILIZE HIS "LEVERAGE" OVER JONES AND MORTON NOTWITHSTANDING HIS DENIAL OF HAVING PROMISED THE SAID WITNESSES ANYTHING

During the recantation proceeding Assistant District Attorney Kavanaugh mentioned that when he initially received the file of this case:

> "...I knew that we only had two people who we had some leverage over, Earl Jones and Dexter Morton." (A 210)

Does this observation not belie his constant trial reaffirmation, obvious from his questions to his witnesses and from his reaction (or lack thereof) to their answers, that he had never promised them anything for their testimony?

Is this not an admission that from the very first moment he received the file, it was Kavanaugh's intention to utilize the leverage on Jones and Morton to secure their testimony by promising them something?

What good is leverage if it cannot be utilized through promises? The answer is obvious.

(16)

NOTWITHSTANDING THE COURT'S INSTRUCTION PURSUANT TO COUNSEL FOR DEFENDANTS' REQUEST THAT VALENTINE BE KEPT AVAILABLE FOR FURTHER TESTIMONY, ASSISTANT DISTRICT ATTORNEY KAVANAUGH RELEASED HIM FROM CUSTODY AND REFUSED TO PRODUCE HIM WHEN REQUESTED BY DEFENSE COUNSEL. HE ALSO REFUSED TO STIPULATE TO MARTHA VALENTINE'S PENDING INDICTMENT. THE COURT UPHELD THE DISTRICT ATTORNEY'S POSITION, SAYING THAT THE INTEREST ISSUE WAS FAR AFIELD. KAVANAUGH THEN PROCEEDED IN SUMMATION TO POINT OUT THAT DEFENSE COUNSEL FAILED TO PRODUCE ANY EVIDENCE OF VALENTINE'S INTEREST AS PROMISED IN THE DEFENSE OPENING STATEMENT

In defense's opening statement, counsel said that he would show that Valentine was testifying because of pending bribery charges against his common law wife Martha. (A)

When Valentine finished his testimony the Court told him to keep himself available for further testimony pursuant to defense counsel's request for such instruction. (A11) Assistant District Attorney Kavanaugh who kept Valentine in custody through the completion of his testimony then released Valentine, notwithstanding the Judge's instruction.

Thus when the defense sought to recall Valentine to examine him on interest after the People rested the Assistant District Attorney said he could not produce him. After vigorous opposition by Assistant District Attorney Kavanaugh, the Judge denied this application even after the People refused to stipulate that Martha Valentine had been indicted and arrested for bribery which charge was still pending. (A 143-146)

Kavanaugh then commenced in his summation that the defense failed to prove what it promised about Valentine's wife.

> "Of course, you may have recalled that in his opening Mr. Kassner made reference to the fact that Mr. Valentine had a relative under indictment and this is what the prosecutor is using to beat his head unconscious to make him testify as to what he has. Of course, there is no proof of that."(A183)

From the foregoing and by reason of the dispatch with which his other three witnesses were freed, paid and given a one-way ticket out of the State, it is apparent that Assistant District Attorney Kavanaugh intended to do everything within his power to conceal his own misconduct by making his witnesses unavailable. That three of the four

reappeared soon after the trial and recanted does not negate Kavanaugh's efforts to cover up.

(17)

KAVANAUGH IMPROPERLY STATED IN THE PRESENCE OF THE JURY THAT HE GAVE DEFENSE COUNSEL A COPY OF VALENTINE'S GRAND JURY TESTIMONY AND TAPED FIRE MARSHAL CONVERSATION AND, IN SUMMATION COMPOUNDED THE IMPROPRIETY BY ARGUING THAT NOT HAVING HEARD ANYTHING "ABOUT THAT TAPE" DURING VALENTINE'S TESTIMONY, THE JURY SHOULD INFER THAT HIS FIRE MARSHAL CONVERSATION OF OVER A YEAR BEFORE THE TRIAL WAS CONSISTENT WITH HIS TESTIMONY

Although the ostentatious jury performance by a District Attorney of his obligation to comply with Rosario for the purpose of impressing the jury with his fairness is not unknown and has not been condemned as yet by this Court, where such an essentially cheap trick is combined with a summation argument based upon turning over of material, it is reprehensible and should be condemned. On summation, Assistant District Attorney Kavanaugh argued as follows:

> "I would indicate also that Mr. Valentine, you may recall, after he finished his testimony, that I indicated on the record that I have turned over to counsel a copy of the conversation between Mr. Valentine and the fire marshals, a tape, tape made September of 1972. But he is supposed to be lying to you. Of course, we heard nothing about that tape when he took the stand. I think it is a fair inference of what he said, in light of the other cross-examination of other witnesses, that what he said in September, 1972 to the fire marshals, before these men were ever arrested, is the same thing that he told you on this witness stand."(A184-185).

The foregoing constitutes overreaching at its

height. Firstly, while the three arsonists told different stories before the trial, it was never claimed that Valentine had changed his tale. Thus the Assistant District Attorney raised a straw man and then improperly introduced matter that should not be on the record for the purpose of drawing an inference to destroy his own straw man. He thereby attempted to confuse the jury into forgetting about the prior inconsistent statements of the three arsonists. This he may have accomplished.

This is but one of many ways in which Kavanaugh attempted to obfuscate, suppress and distort the truth in his admitted presentation of a case most favorable "for the People of the State of New York."(A217)

(18)

KAVANAUGH PREPARED THE TESTIMONY OF THE PROSECUTION WITNESSES, NOT IN THE INTEREST OF CLARIFYING AND PRESENTING TRUTH, BUT SO THAT IT WOULD BE MOST FAVORABLE "FOR THE PEOPLE OF THE STATE OF NEW YORK"

As was noted heretofore, Kavanaugh testified in the recantation proceeding that he prepared his witnesses' testimony so that it would be most favorable "for the People of the State of New York". (A 217)

"Q. You were preparing the witness?

A. Most definitely.

Q. Preparing him so he would be most favorable for you?

A. Not for me, for the People of the State of New York."

Apparently it was Mr. Kavanaugh's impression that the defendants were not a part of the People of the State of New York and that it was his duty, not to present the truth in its entirety, but rather testimony most favorable to the prosecution. In the light of this admission his conduct becomes more comprehensible though no more justifiable.

ARGUMENT

PROSECUTORIAL MISCONDUCT, INCLUDING INDUCING SUBORNING AND FAILING TO CORRECT PERJURY BY GOVERNMENT WITNESS, HIDING AND FAILING TO DISCLOSE SUCH WITNESSES' INTEREST IN TESTIFYING, AND OVERREACHING AND IMPROPER TRIAL TACTICS, DENIED PETITIONER GOMBERG A FAIR TRIAL WITHIN THE MEANING OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment to the United States Constitution requires that no state deprive any person of life, liberty or property without due process of law. Implicit in this amendment is that due process is denied in a criminal case if the conviction is obtained after the prosecution knowingly uses perjured testimony. Mooney v. Holohan, 294 U.S. 103 (1935). This is true even though the perjured testimony does not concern a substantive issue but only pertains to the witness's credibility. When the testimony of a witness is an important part of the prosecution's case against a defendant, facts bearing on the credibility of the witness such as his interest are important and relevant aspects of the case. The jury is entitled to know these facts and their concealment from the jury constitutes as much a denial of due process as the prosecutions use of perjuried testimony. Napue v. Illinois, 360 U.S. 264 (1959); People v. Mangi, 10 N.Y. 2d 86 (1961); People v. Savvides, 1 N.Y. 2d 554 (1956). See also: DeMarco v. United States, 415 U.S. 449, (1974); Giglio v. United States, 405 U.S. 150 (1972); Washington v. Vincent, 525 F.2d 262 (CA2 1975); United States v. Deutsch, 475 F. 2d 55 (CA5 1973); United States v. Mele, 462 F. 2d 918

(CA2 1972). In either case convictions based on such tainted testimony are reversible per se.

In Napue v. Illinois, supra, which is perhaps the leading Federal case in this area, the Supreme Court held that the use of unsolicited false testimony which was known to the District Attorney to be false vitiated the defendant's conviction. There, as in the instant case, the principal state witness testified in response to a question by the prosecutor that he had received no promise of consideration in return for his testimony. The prosecutor knew at the time that this testimony was false but did nothing to correct it. In its opinion, the Court noted that the New York Court of Appeals in a similar case, People v. Savvides supra, had reversed a defendant's conviction because it was based on similar perjured testimony which was known to the prosecution to be false.

In the Savvides case the Court condemned the fact that the prosecutor permitted a witness for the prosecution to deny that he expected any consideration in return for his testimony when in fact he had been told that for his cooperation he could withdraw his prior plea of guilty and plead guilty to a lesser crime. Writing for a unanimous Court, Judge Fuld stated:

> "The conviction cannot stand. The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach. The prosecutor should have corrected the trial testimony given by (the witness) and the impression it created. He should have, by immediate statement of his own or by further appropriate examination of the witness forthrightly exposed the lie, so that the court and jury would have known that the witness had reason to expect lenient treatment for 'continued...cooperation'. His

> failure to do so constitutes 'error so fundamental, so substantial,' that a verdict of guit will not be permitted to stand (citation omitted)". Id. at pp. 556-557

The holding of Savvides was reiterated in People v. Mangi, 10 N.Y. 2d 86 (1961). In that case, as in the instant case, an accomplice of the defendant was told by the assistant district attorney that if he cooperated with the prosecution in testifying against the defendant his cooperation would be brought to the Court's attention. The represenatation was never made known to the defendant or the jury and in fact the accomplice testified that no promises were made to induce his cooperation. The Court recognizing the importance of the accomplice's testimony noted:

> "That fairness required that such an understanding be brought to the attention of.. (the) jury. That is especially true, where, as here, (the accomplice) denied that a promise of any kind had been made to him" Id. at pp. 89-90.

Recently this Court in Washington v. Vincent, supra, instructed the district court to grant a petition for a writ of habeas corpus where the prosecution permitted a witness to falsely deny that offers of favorable treatment in exchange for his testimony had been made to him. The witness's credibility and motive to testimony was the focus of the defendant's attacks and if the jury had known of the promises of leniency to the witness the defendant may very well had been found not guilty.

In the present case Hatton, Jones and Morton presented the only testimony connecting Gomberg with the burning of the massage parlors. Without their testimony, there could have been no conviction. In reality, the credibility of these witnesses

was the major, if not the only issue in the case. As the Court of Appeals for the Ninth Circuit has pointed out in dealing with a similar situation:

> "Thus...(the accomplice)... had a strong motive to 'dump' the case on someone, and he did just that. His testimony, like that of every other accomplice, is suspect. Under the circumstances, we are under special obligation to examine the other asserted errors in the conduct of the trial to insure that a miscarriage of justice does not occur." United States v. Hibler, 463 F. 2d 455 (CA9 1972).

The United States Supreme Court pointed out the overriding significance of the credibility issue in Napue v. Illinois, supra at 269.

> "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."

See also: United States v. Smith, 480 F. 2d 664 (CA5 1973).

The Napue, Washington, Savvides and Mangi cases demonstrate that Gomberg's right to due process was violated. It is clear, admitted and undisputed that implicit and explicit promises and representations were made by fire marshals and assistant district attorneys to prosecution witnesses in exhcange for their testimony against Gomberg. In the case of Hatton, he was immunized from prosecution for admitted arson and told not to worry about an unexpired jail term and warrant for escape hanging over his head. In the case of Morton, a completed plea bargain had been made with his attorney. Assistant District Attorney Kavanaugh admitted this in his post trial testimony. It is clear from the

record that the prosecution witnesses Hatton and Morton prejured themselves when they denied that any promises had been made to them in exchange for their testimony and that Assistant District Attorney Kavanaugh knew it at the time that they testified. In permitting the perjured testimony to stand he consciously deceived the jury and the Court to believing that there were no reasons other than a general desire to help themselves for the witnesses to testify against Gomberg. The fact that the jury may have been presented with other grounds for infering that the witnesses had an interest to testify falsely does not turn "a tainted trial into a fair one." Napue v. Illinois, supra, at 270.

Assistant District Attorney Kavanaugh's attempt to gain Morton's testimony without revealing the witness' interest in testifying through the ruse of conspiring with the witness' attorney must also be condemned. He admits settling a plea bargain with Hatton's attorney, yet justifies concealing such interest from the jury be stating that he instructed Morton's attorney that Morton not be told the substance of the deal, but merely advised that cooperation would be to his best interests. It cannot be seriously contended that this promise to Mortion's attorney was not tantamount to telling Morton himself. In Allen v. State, 128 Ga. App. 361, 196 S.E. 2d 660 (1973), a Georgia prosecuting attorney made a promise to the defendant's attorney that he would recommend leniency in return for his testimony. The Court held that this was the same as telling the defendant himself, observing that:

> "..prosecuting attorneys cannot do indirectly (promise the witness' attorney) what they cannot do directly (promise the witness himself)." Id at 196 S.E. 2d 662.

The Court in Allen properly pointed out, that to hold otherwise would be to permit prosecution attorneys to make a mockery of Napue, Giglio and other cases in this area.

In addition to suborning perjury and devising a scheme to subvert justice Kavanaugh violated the mandate of Brady v. Maryland, 373 U.S. 83 (1963) and suppressed evidence that was favorable to appellants. Gomberg and the others were never told of the fact that Hatton, Jones and Morton were to be paid for their testimony with money, airplane tickets, immunity, illegal pardons, conditional discharges, etc. They were never told that Hatton had been advised not to worry about his parole violation and the outstanding warrant for his arrest, and that his cooperation would be told to the district attorney and the Court. Not only was all this withheld from Gomberg, but Kavanaugh also lied to the Court and mislead the trial judge into believing that the occasion when all the witnesses were together discussing their testimony was an isolated one when the truth was that the witnesses, contrary to their testimony, had been together frequently prior to the trial testimony, had been together frequently prior to the trial and since the beginning of the trial. Kavanaugh continued this deception even during his direct testimony at the post trial hearing and it was not until he was being cross-examined did he admit that he had not told the truth.

It is hornbook law that a defendant is entitled to a fair trial without prosecutorial trickery or overreaching.

People v. Fein, 24 A.D. 2d 32, 263, N.Y.S. 2d 629, affd. 18 N.Y. 2d 162, 272 N.Y.S. 2d 753; People v. Washington, 38 A.D. 2d 189, 328 N.Y.S. 2d 317, amend, rearg. den., 39 A.D. 2d 726, 331 NY.S. 2d 880, affd. 32 N.Y. 2d 401, 345 N.Y.S. 2d 520. The prosecutor has an affirmative duty and primary obligation to ensure defendant a fair trial. People v. Lumbard, 4 A.D. 2d 666, 168 N.Y.S. 2d 419. This obligation increases with the seriousness of the crime charged. People v. Snyder, 297 N.Y. 81; People v. Johnson, 284 N.Y. 182. As clearly set forth in the Canons of Professional Ethnics, the prosecutor owes more to the cause of fairness and justice than to be motiviated solely by his adversary representation to seek a conviction. People v. Castello, 24 A.D. 2d 827, 264 N.Y.S. 2d 136; People v. Petrucelli, 44 A.D. 2d 58, 353 N.Y.S. 2d 194.

In the instant case there is revealed virtually every type of prosecutorial misconduct possible by an Assistant District Attorney whose testimony in the course of post trial proceedings manifests an utter and complete lack of comprehension of his role and duties as an essential component of a judicial process founded and institutionalized for one purpose only, the search for truth, and through such truth, for justice to all.

Through the rare proceeding instituted by reason of witness recantation, it was possible to inquire into the motivation, philosophy and behavior of this assistant district attorney and learn about his covert use of "leverage" in the name of the People of the State of New York. He has admitted inducing and permitting perjury by his witnesses, failing to correct perjurious statements uttered by his witnesses; persuading attorneys to induce the witness

to testify, yet hide the details of the reward for such testimony from the witness and hide the existence of such promised reward from the jury, failing to divulge to the jury implied and express promises made to his witnesses to induce their testimony and thereby hiding from the jury the interest which caused them to testify and otherwise engaging in trickery and overreaching so base and reprehensible as to undermine confidence in the Anglo-American judicial system. The amazing facet of this entire case which leaps naked and apparent from the record is that Kavanaugh showed neither shame, remorse nor consciousness of having perpetrated any impropriety.

If the pattern of prosecutorial conduct utilized in the trial of this case does not warrant reversal of the district court's dismissal what then is the meaning of due process and its implications upon a fair trial? It is submitted that due process means much more than a formal charade known as a trial with review by an appellate court of perjured testimony secured by veiled and undisclosed prosecutorial promises of rewards to threatened felons who comprise the totality of prosecution witnesses.

The district court was in error in considering the quantum of evidence of guilt in arriving at its decision. The fundamentals of due process cannot be undermined by such a consideration. Napue v, Illinois, supra, 360 U.S. at 269 People v. Savvides, supra; People v. Rosenfeld, 11 N.Y. 2d. 290; People v. Cosimo, 4 AD 2d 833, 168 N.Y.S. 2d 805, affd. 4 N.Y. 2d 833, cert. den. 358 U.S. 849; People v. Rafkind, 254 AD 742, 3 N.Y.S. 2d 997.

As the Supreme Court said in Napue a conviction must be set aside if:

> "the false testimony could...in any reasonable likelihood have affected the judgment of the jury... (or if) the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial." 360 U.S. at 271-272. (Emphasis supplied).

The New York Court of Appeals is of the same opinion. Savvides, at Page 558, stated:

> "Convincing though proof of guilty may be, and thre can be no denial of its strength in this case, we could here affirm 'only if we were to announce a doctrine that the fundaments of a fair trial need not be respected it there is proof in the record to persuade us of defendant's guilt'. People v. Mleczko) We were not in Mleczko, and we are not now, prepared to announce such a doctrine."

CONCLUSION

The order of the district court should be reversed with instructions to grant the writ of habeas corpus.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
)SS.:
COUNTY OF NEW YORK)

ROSE PUGLISI, being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at 122 E. 42nd Street, New York, N.Y. 10017.

That on the 1st day of June, 1976, deponent served the within Appellant's Brief and Joint Appendix upon

Robert L. Morgenthau
District Attorney of
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the address designated by said attorneys(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within New York State.

Rose Puglisi

Sworn to before me,

this 1st day of June, 1976.

Paul E. Warburgh

PAUL E. WARBURGH, JR.
NOTARY PUBLIC, State of New York
No. 52 - 9528430
Qualified in Suffolk County
Commission Expires March 30, 1978